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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TICOR TITLE INSURANCE COMPANY, ET AL.,
Petitioners,
v.
WALTER THOMAS BROWN AND JEFFREY L. DZIEWIT,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE NATIONAL FOOTBALL LEAGUE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a federal court may refuse to enforce a prior federal class action judgment, properly certified under Rule 23, on the ground that absent class members have a constitutional due process right to opt out of any class action which asserts monetary claims on their behalf.

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INTEREST OF THE NATIONAL FOOTBALL LEAGUE

Having obtained written consent of the parties pursuant to Rule 37.2 of the Rules of this Court,[1] the National Football League (the "NFL" or the "League") respectfully submits this brief as *amicus curiae* in support of the Petitioners.

The Ninth Circuit's decision below may be read as holding that, as a matter of due process, opt-out rights must be accorded to absent class members in all class actions asserting claims for damages. *See Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992). The NFL has a substantial interest in the constitutionality of mandatory non-opt-out class actions certified pursuant to Federal Rules of Civil Procedure 23(b)(1) and (b)(2), particularly when the claims in such actions are predominantly for injunctive relief.

Currently, there are pending before the United States Court of Appeals for the Eighth Circuit six appeals from the district court's approval of a mandatory non-opt-out class action settlement in *White v. National Football League*, Civ. No. 4-92-906 (D. Minn.). The *White* settlement will finally bring to an end a bitter, six-year labor dispute between the NFL and its player-employees. This prolonged dispute has been marked at various stages by a work stoppage, the purported abandonment by the NFL players' union of its collective bargaining rights, numerous and repeated lawsuits, including a three-month jury trial that resulted in an ambiguous verdict, and the prospect of years of further litigation and uncertainty with respect to the League's player employment practices. The allowance of opt-out rights and the consequent potential maintenance of

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[1] The letters of consent have been filed with the Clerk of this Court.

individual damage actions, approximately thirty of which are already pending, including a purported class action that seeks both damages and an injunction precluding compliance with the settlement agreement, would have rendered impossible the singular and overriding goal of the League and its players in seeking a settlement – the achievement and maintenance of a prolonged period of "labor peace" after years of bitter labor strife.

The settlement agreement, which was implemented in March 1993, has completely restructured the player employment practices in the NFL. The agreement also commits the League to make settlement payments in the amount of $115 million to class members. However, because of the vital importance of binding all class members to the settlement and in light of the unprecedented decision of the Ninth Circuit below, the agreement grants the NFL the option to terminate the settlement agreement in the event the mandatory non-opt-out class is found impermissible.[2]

Among the issues on appeal in *White* is the district court's decision to certify a mandatory non-opt-out settlement class pursuant to Rule 23(b)(1), and its determination that individual members of that class do not have a constitutional due process right to opt out of the settlement and maintain their own actions for damages and injunctive relief.

Accordingly, the NFL has a vital interest in having this Court reaffirm the constitutional viability of Rule 23(b)(1) and (b)(2) mandatory class actions in cases involving both injunctive and damage claims.

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2 Alternatively, the League has the option, under a separate side-letter agreement submitted to the court, to extend the term of the settlement in the event the mandatory non-opt-out class is found impermissible.

SUMMARY OF ARGUMENT

The history of the NFL's labor dispute with its players that culminated in the class action settlement in *White*, together with the procedural safeguards employed therein to protect the interests of absent class members, demonstrates that the Ninth Circuit's decision is overbroad and incorrect. The decision below: (i) adopts unwarranted and unprecedented new standards of due process where claims for injunctive relief predominate over claims for monetary relief; (ii) if affirmed, would render unconstitutional all mandatory federal class actions involving damage claims, thereby invalidating Federal Rules 23(b)(1) and (b)(2) in a large number of cases; and (iii) severely undermines the practical utility and policy goals of the Rule 23 mechanism. Accordingly, the Ninth Circuit's decision should be reversed.

ARGUMENT

I. THE HISTORY OF THE *WHITE* CASE, TOGETHER WITH THE PROCEDURAL SAFEGUARDS EMPLOYED THEREIN, DEMONSTRATES THAT THE NINTH CIRCUIT'S DECISION IS OVERBROAD AND INCORRECT

The NFL respectfully submits that the procedural safeguards employed by the district court in evaluating and ultimately approving the mandatory class action settlement in *White* were in complete accord with minimum due process requirements. In short, the *White* case illustrates how a mandatory non-opt-out class action involving both injunctive and damage claims can properly be maintained consistent with the fair treatment of absent class members.

The mandatory class settlement in *White* provides a useful illustration not only of why mandatory class actions are "fair," but also why they are "necessary" in so many instances. The labor dispute between the NFL clubs and the NFL players could not, and would not, have been settled but for the availability of the mandatory class action mechanism provided under Rule 23. Quite simply, the League's primary, if not singular, purpose in agreeing to the class action settlement was that through a single, binding resolution of all injunctive and damage claims, the bitter labor strife that had marked the League's operations for nearly six years would finally come to an end. Any arbitrary rule barring mandatory classes would not only have precluded the global "labor peace" that the *White* mandatory class settlement has achieved, but also would have unnecessarily subjected the federal court system to many more years of needless and wasteful litigation and the likelihood of inconsistent adjudications.

The class action settlement in *White* grew out of, and, if affirmed on appeal, will finally resolve a nearly six-year labor dispute between NFL clubs and NFL players, which focuses primarily on the parties' conflicting views with regard to the issue of veteran free agency. The players desired complete free agency, which would have permitted every NFL player to offer his services to every NFL team upon expiration of his contract. The NFL, on the other hand, believed that the need to maintain competitive balance, and thereby to make the NFL's entertainment product more attractive to consumers, required that there be reasonable restrictions on a veteran player's mobility so that the best NFL players would not flock to the more attractive markets or to the better quality teams. Thus, from the beginning,

this dispute has been about the nature and structure of the NFL's player employment practices.

Prior to the 1987 football season, the parties attempted unsuccessfully in collective bargaining negotiations to reach agreement on an acceptable compromise of the free agency issue. On September 22, 1987, the National Football League Players Association (the "NFLPA") — the exclusive collective bargaining representative of the NFL players — declared a strike. The strike failed to produce a compromise, however, and upon returning to work on October 15, 1987, the players filed *Powell v. National Football League*, Civ. No. 4-87-917 (D. Minn.) — a mandatory class action lawsuit alleging that the League's continued imposition of its earlier collectively bargained free agency system, as well as various other collectively bargained employment practices, violated the antitrust laws.

The district court certified a mandatory non-opt-out class action for injunctive relief and damages. *See Powell v. National Football League*, 711 F. Supp. 959, 966-69 (D. Minn. 1989). However, in November 1989, after more than two years of litigation, the Court of Appeals for the Eighth Circuit rendered the *Powell* lawsuit a virtual nullity when it determined that, because the challenged employment rules at issue had been "conceived in an ongoing collective bargaining relationship," the players' challenge was precluded by the nonstatutory labor exemption to the antitrust

laws. *Powell v. National Football League*, 930 F.2d 1293, 1303 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991).[3]

Immediately following the Eighth Circuit's decision in *Powell*, the NFLPA took various steps purportedly designed to end its collective bargaining relationship with NFL clubs and for the express purpose of terminating the labor exemption. Over the next three years leading up to the mandatory class action settlement in *White*, approximately thirty separate lawsuits, many of which were funded by the NFLPA, were filed by individual and groups of NFL players in fifteen federal and state courts across the country.

Principal among these cases was a lawsuit titled *McNeil v. National Football League*, Civ. No. 4-90-476 (D. Minn.). The *McNeil* case challenged the legality of the League's Plan B veteran player reservation system – a less restrictive version of the veteran player reservation system set forth in the 1977 and 1982 collective bargaining agreements. In May 1991, the district court held that the NFLPA's actions had been sufficient to end the labor relationship between the NFLPA and the NFL clubs, and thus that such actions had effectively terminated the nonstatutory labor exemption. *Powell/McNeil v. National Football League*, 764 F. Supp. 1351, 1355-59 (D. Minn. 1991). This ruling cleared the way for a trial on the merits.

The *McNeil* case was ultimately tried to verdict before a jury in a ten-week trial in the summer of 1992. Responding

3 The Minnesota district court later decertified the mandatory class and dismissed the case. *Powell v. National Football League*, 773 F. Supp. 1250 (D. Minn. 1991). The Eighth Circuit's decision on the NFL's appeal is being held in abeyance pending the resolution of the *White* appeal. *Powell v. National Football League*, No. 91-3430MN (8th Cir.).

on a Special Verdict Form, the jury found that: (1) Plan B "had a substantially harmful effect on competition in the relevant market for the services of professional football players"; (2) Plan B "significantly contribute[s] to competitive balance in the NFL"; and (3) Plan B was "more restrictive than reasonably necessary to achieve . . . competitive balance." *See McNeil v. National Football League*, 1992-2 Trade Cas. (CCH) ¶ 69,982, at 68,769 (D. Minn. 1992).[4] The jury also found that at least one of the plaintiffs had suffered antitrust injury and, in awarding damages only to four of the eight plaintiffs in the total amount of $543,000 (before trebling), rejected the damage formula proferred by the plaintiffs. *See id.* The jury's damage award demonstrates that a formulaic approach to proving damages is not feasible, and that in the absence of a single settlement, separate litigation of all damage claims would have been required.

After the verdict, both sides claimed victory. The League claimed that the verdict demonstrated that it was entitled to a system of veteran player reservation rules to protect its

4 Significantly, however, the district court had instructed the jury that it was the defendants' burden to prove that there existed no significantly less restrictive alternatives to Plan B. In later approving the terms of the *White* class action settlement, the district court specifically identified this instruction as one of several "significant issues for appellate review." The district court also listed: (i) the scope of the nonstatutory labor exemption; (ii) the application of the rule of reason under Section 1 of the Sherman Act; (iii) the court's jury instructions regarding antitrust injury; and (iv) its determination with regard to the League's "single entity" defense. *See White v. National Football League*, 822 F. Supp. 1389, 1418 (D. Minn. 1993) ("*White I*"); *White v. National Football League*, No. 4-92-906, 1993 U.S. Dist. LEXIS 14570, at *24 (D. Minn. Aug. 19, 1993) ("*White II*").

legitimate business interest in competitive balance, and that not all NFL players were injured by the NFL's Plan B player reservation system. The players claimed that the verdict established their right to free agency and that all players were injured, if not damaged, by Plan B.

Less than two weeks after the *McNeil* jury verdict, the class plaintiffs filed *White v. National Football League*, Civ. No. 4-92-906 (D. Minn.). The complaint originally sought only antitrust injunctive relief but was later amended to include a class action claim for damages stemming from the challenged NFL player employment practices.[5] In October, 1992, plaintiffs in *White*, as well as the plaintiffs in *McNeil*, moved for an injunction that would have barred defendants from enforcing the Plan B player reservation system, or imposing any other player reservation system, on veteran NFL players whose contracts were to expire on February 1, 1993.

Against this backdrop of numerous and varied litigations, pending post-trial motions in *McNeil*, injunction motions in *McNeil* and in *White*, and the certainty of an appeal involving "complex and difficult" and "significant issues for appellate review," on January 6, 1993, the parties reached an agreement in principle to settle the *White* case, and a wide range of related litigation. The settlement was the result of extensive arm's length negotiations between class counsel and the League. In order to facilitate their agreement to settle, the district court conditionally certified a mandatory settlement class pursuant to Rule 23(b)(1) in separate orders dated January 6, and February 17, 1993.

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5 Among the player employment practices challenged by the class were the Plan B veteran player reservation system, the college draft, the NFL Player Contract, and preseason pay rules.

White I, 822 F. Supp. at 1395; *White II*, 1993 U.S. Dist. LEXIS 14570, at *6. In the words of the district court:

> Those mandatory class certification orders have provided a vehicle for the settlement of, among other things, all player challenges to the Plan B veteran player reservation rules, the college draft and the preseason pay rules. The settlement is the critical step toward the final resolution of the longstanding dispute between the NFL clubs and their player-employees.

White I, 822 F. Supp. at 1395.

On February 26, 1993, plaintiffs and defendants in *White* signed a Stipulation and Settlement Agreement, which was designed to bring an end to that litigation and to a wide range of related cases. By order of the same date, the district court preliminarily approved the proposed settlement as fair, reasonable, and adequate, and ordered that notice of the proposed settlement be provided to all class members.[6] These notices, approved by the court, described the settlement and informed all class members that a hearing would be held to determine whether the proposed settlement was fair, reasonable, and adequate. The notices also informed the class members that they had a right to submit written objections and to appear at the settlement hearing, in person or by counsel, to be heard in support of, or in opposition to,

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6 In all, approximately 5,300 notices were mailed to potential class members, including current or former NFL players and graduating college players. Of these, a total of 458, or less than ten percent, were returned as undeliverable. Of the 458 returned notices, 300 were remailed to newly located addresses. *See White I*, 822 F. Supp. at 1400.

the settlement, or to make any other statement of their position with respect to the settlement.

The settlement itself represented a compromise on a wide array of issues. For the players, the settlement agreement provided a system of unrestricted free agency for players with at least four or five years of accrued service in the League (depending on whether a League-wide "cap" on salaries becomes effective). Thus, the players achieved one of their principal and overriding objectives. The League also was able to protect its interest in competitive balance by preserving the college draft, limiting the number of players that could be either "unrestricted" free agents or "restricted" free agents (subject to their existing team's right to match another team's offer to the player), securing a League-wide cap on salaries and the amount of money to be paid to "untested" rookies, and limiting the number of veteran free agents that the League's "better" teams may sign.

Other provisions of the settlement agreement, although setting forth formal structural relief, in reality provided a monetary benefit to the players. These provisions included, among others: (i) increases in minimum salaries applicable to rookie and veteran players; (ii) League-wide and team "guarantees" in the percentage of revenues to be paid to players in the event a "salary cap" comes into existence; and (iii) various modifications to the NFL Player Contract, including a prohibition on payment of uniform preseason wages. Finally, the settlement also called for a $115 million payment, which is to be distributed directly to class members through a settlement distribution formula. *White I*, 822

F. Supp. at 1412-16; *White II*, 1993 U.S. Dist. LEXIS 14570, at *43-53.[7]

In the weeks following preliminary court approval, 73 NFL players (out of an identifiable class of approximately 5,000 players), 16 college players, one attorney-agent, and one NFL member club (the Philadelphia Eagles) filed objections to the proposed settlement on various grounds. All such objectors and/or their counsel were given a full and fair opportunity to voice their objections to the proposed settlement, including the opportunity to produce witnesses subject to cross-examination and to offer exhibits, at a formal court hearing on the fairness, reasonableness, and adequacy of the proposed settlement.

A number of these objectors specifically objected to the maintenance of a mandatory class under Rule 23(b)(1), arguing that they had a due process right to opt out of the settlement to pursue individual damage claims. Indeed, several such objectors went so far as to object to the monetary portion of the settlement by offering expert testimony regarding their claimed damages in comparison to their proposed recovery under the settlement.

Several of the "opt-out" objectors were also seeking injunctive relief which would have invalidated their existing

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7 In this regard, the *White* case is distinguishable from the facts of the case below. In *White*, the district court was able to balance the fairness of a $115 million settlement fund with the likely value of the class' damage claims generally, and the individual objectors' claims in particular. In the case below, the settlement was exclusively injunctive in nature and did not contain any provision for direct monetary payment to the class members. Indeed, the district court in *White* relied on this complete absence of identifiable monetary recovery for the absent class members as a ground for distinguishing the Ninth Circuit's decision below. *See White I*, 822 F. Supp. at 1412; *White II*, 1993 U.S. Dist. LEXIS 14570, at *38 n.31.

player contracts. Such relief would have been contrary to the terms of the *White* settlement agreement. Still another "opt-out" case, filed in the United States District Court for the Eastern District of Louisiana and purporting to be a mandatory class action for damages, also sought to have the settlement agreement set aside as violative of the antitrust laws. In all, at the time the *White* settlement received court approval, there were seventeen separate lawsuits pending in various federal district courts around the country in which individual objectors purported to challenge the same set of player employment rules at issue in *White*.[8] In addition, through the mandatory class mechanism, the NFL was also

[8] *See Hurst v. National Football League*, No. 92-3263 (E.D. La.); *Hurst v. National Football League*, No. 93-0766 (E.D. La.); *Dusbabek v. National Football League*, No. 4-93-126 (D. Minn.); *Lee v. National Football League*, No. 4-93-125 (D. Minn.); *McMillian v. National Football League*, No. 4-93-99 (D. Minn.); *Wright v. National Football League*, No. 4-93-124 (D. Minn.); *Jones v. National Football League*, No. 92-2512 (C.D. Cal.); *Sanders v. National Football League*, No. 92-4365 (C.D. Cal.); *Matthews v. National Football League*, No. 92-4370 (C.D. Cal.); *Hunter v. National Football League*, No. 92-4373 (C.D. Cal.); *O'Neal v. National Football League*, No. 92-4368 (C.D. Cal.); *Allen v. National Football League*, No. 92-7536 (C.D. Cal.); *Norton v. National Football League*, No. 93-0029 (C.D. Cal.); *Harper v. National Football League*, No. 4-93-314 (D. Minn); *Risien v. National Football League*, No. 4-93-182 (D. Minn.); *Duncan v. National Football League*, No. 93-1481 (C.D. Cal.); *Evans v. National Football League*, No. 92-878 (D. Ariz.).

able to settle 11 other pending federal and state court player lawsuits, all funded by the NFLPA, challenging the League's player employment rules.[9]

Absent the mandatory class mechanism, the NFL would likely have had to litigate all or most of these lawsuits to verdict, with a near certainty of varying or inconsistent adjudications. As the district court found in approving the *White* settlement, the likelihood of varying adjudications would have been increased by the inconsistent case law regarding several key issues raised in these litigations. *See White I*, 822 F. Supp. at 1408-09. For instance, with regard to the scope of the nonstatutory labor exemption, presently at least three different standards exist in three different circuits. *Compare Powell v. National Football League*, 930 F.2d 1293, 1303 (8th Cir. 1989) (exemption ends when parties' "labor relationship" ends), *cert. denied*, 498 U.S. 1040 (1991) *with Brown v. Pro Football, Inc.*, 782 F. Supp. 125, 129-34 (D.D.C. 1991) (exemption ends when parties' collective bargaining agreement expires) *and with Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960, 964-67 (D.N.J. 1987) (exemption ends when employer no longer "reasonably believes that the [challenged] practice

[9] *See Allen v. Chargers Football Co.*, No. CV-91-4322 (C.D. Cal.); *Chandler v. Indianapolis Colts, Inc.*, No. 54C01-9009-CP-0453 (Ind. Cir. Ct.); *Hebert v. Los Angeles Raiders*, No. S023546 (Sup. Ct. Cal.); *Jackson v. National Football League*, No. 4-92-876 (D. Minn.); *Joyner v. National Football League*, No. 92-2876 (E.D. Pa.); *McNeil v. National Football League*, No. 4-90-476 (D. Minn.); *Morris v. New York Giants, Inc.*, (arbitration); *Mullin v. Los Angeles Rams Football Co.*, No. BC-021838 (Cal. Super. Ct.); *Powell v. National Football League*, No. 91-3430MN (8th Cir.); *Solomon v. National Football League*, No. 92-1244-F (Tex. Dist. Ct.); *Tice v. Pro Football, Inc.*, No. 4-93-166 (D. Minn.).

or a close variant of it will be incorporated in the next collective bargaining agreement''). Similar conflicts exist with regard to the recognition of competitive balance as a procompetitive effect,[10] and the proper allocation of the burden of proof in a rule of reason case.[11]

On April 30, 1993, having reviewed and considered all of the briefs and affidavits submitted in support of, and in opposition to, the proposed settlement, having listened to the testimony of live witnesses, and having heard oral argument, the district court issued a 115-page order overruling all objections to the proposed settlement. Specifically, the district court's order: (i) reaffirmed that the requirements of Rule 23(b)(1) had been satisfied and that mandatory non-opt-out class certification of a settlement class thereunder had been appropriate in order to avoid the risk of inconsistent adjudications, as those risks were reflected by the requests for differing relief in several of the opt-out cases; (ii)

10 *Compare Mackey v. National Football League*, 543 F.2d 606, 621 (8th Cir. 1976) (recognizing competitive balance as a procompetitive benefit), *cert. dismissed*, 434 U.S. 801 (1977) *with Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1186 (D.C. Cir. 1978) (refusing to recognize competitive balance as a procompetitive effect).

11 *Compare North American Soccer League v. National Football League*, 670 F.2d 1249, 1261 (2d Cir.) (defendants' burden to come forward with proof that there existed no less restrictive alternative), *cert. denied*, 459 U.S. 1074 (1982) *with Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1412-13 (9th Cir.) (plaintiff's burden to show that any legitimate objectives cannot be achieved in a significantly less restrictive manner), *cert. denied*, 112 S. Ct. 617 (1991) *and with United States v. Brown University*, 1993-2 Trade Cas. (CCH) ¶ 70,358, at 70,897 (3d Cir. 1993) (plaintiff bears the burden of proving that there exists a viable less restrictive alternative).

found that the plaintiff class' claims for structural, injunctive relief predominated over its claims for damages;[12] (iii) held that due process did not require that absent class members be given a right to opt out of the mandatory class action settlement;[13] (iv) granted all objectors seeking to intervene the right of intervention for the limited purpose of allowing them to seek an appeal in the Eighth Circuit; and (v) concluded that, when weighed against the strengths of plaintiffs' case, the benefits bestowed on the class in the form of

12 In so finding, the court relied on: (i) the repeated motions for preliminary and injunctive relief filed by the plaintiffs in the various player-related litigations; (ii) the entire records of the prior player-related lawsuits over which the court presided; (iii) the repeated representations of class counsel and other player representatives that these lawsuits primarily sought either the elimination or substantial modification of various NFL rules regarding player movement and employment; (iv) the statements made by defendants and their representatives to the same effect; and (v) the terms of the settlement agreement itself, which devotes 179 of its 188 pages to redefining the rules and practices governing player employment in the NFL. *See White I*, 822 F. Supp. at 1411; *White II*, 1993 U.S. Dist. LEXIS 14570, at *39-40.

13 In this regard, the district court found that there was no constitutional due process right to opt out of a Rule 23(b)(1) class action settlement where, as in *White*: (i) the plaintiff class' claims for structural, injunctive relief "predominated" over its claims for damages; (ii) absent class members were adequately represented by the named plaintiffs and by capable and experienced class counsel; (iii) absent class members were provided with actual and extensive notice of the settlement and its terms; (iv) absent class members were provided with a full and fair opportunity to assert objections to, and to otherwise be heard with respect to, the settlement and its terms; (v) the district court, after due deliberation of all the relevant facts, the taking of testimony, and hearing the arguments in support of, and in opposition to, the settlement, approved the settlement as fair, reasonable, and adequate. See *White I*, 822 F. Supp. at 1399-1402, 1404-07, 1410-12, 1432; *White II*, 1993 U.S. Dist. LEXIS 14570, at *26-35, *36-37, *37-43, *126, *145-52.

injunctive and monetary relief constituted a fair and adequate settlement of the plaintiff class' claims. *See White I*, 822 F. Supp. at 1402-10, 1410-12, 1416-24, 1432-33; *White II*, 1993 U.S. Dist. LEXIS 14570, at *35-37, *37-43, *53-83, *128-30. Accordingly, the district court concluded that "after carefully considering all of the objections that call into question a specific provision or provisions of the Settlement Agreement, the court nonetheless concludes that the Agreement as a whole is fair, reasonable and adequate to the class." *White I*, 822 F. Supp. at 1426; *White II*, 1993 U.S. Dist. LEXIS 14570, at *96.

The district court, recognizing and expressly holding that claims for injunctive relief predominated over the damage claims, found that the only way to provide "meaningful" relief to the players in *White* was through certification of a mandatory class. Specifically, the court noted that:

> class members' claims are interrelated because players are subject to a uniform system of player rules; therefore there is a significant identity of interest between class members for purposes of analyzing their economic injuries. To provide a meaningful class remedy, any injuries must be redressed primarily through broad injunctive relief. In the absence of such relief, any award of monetary damages would merely be a stopgap measure, insufficient to prevent the reoccurrence of such injuries while likely generating an unending procession of lawsuits.

White I, 822 F. Supp. at 1411 (citation omitted). Thus, the court found that a mandatory class was necessary to avoid repetitious litigation and inconsistent adjudications, and to afford similar treatment to all class members. *See id.* at 1407-10.

After an agreement in principle had been reached to settle the *White* lawsuit, the NFLPA took steps to reconstitute itself as the exclusive collective bargaining representative of all NFL players. In March 1993, having submitted evidence of its majority support among NFL players, the NFL voluntarily recognized the NFLPA as the exclusive collective bargaining representative of all present and future NFL players.

Thereafter, the NFLPA and NFL began a process of daily intensive collective bargaining. On May 6, 1993, the NFL clubs and the NFLPA entered into a new collective bargaining agreement which included the material terms of the settlement agreement, as well as other terms and conditions of employment in the NFL.[14] That collective bargaining agreement — which will continue in effect until 2000 — was ultimately ratified by approximately 96% of the players voting.

The viability of the collective bargaining agreement, however, may depend on the continuing existence of the *White* settlement. If a mandatory class is not maintained in *White* and the NFL exercises its option to terminate, the continuing viability of the collective bargaining agreement will be in question.

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[14] On May 14, 1993, a motion was made to amend the original Stipulation and Settlement Agreement so as to reflect certain modifications necessitated as a result of collective bargaining. The district court once again proceeded with a formal settlement approval process which included a preliminary approval hearing, notice to the class inviting individual objections, and a final approval hearing. The court granted final approval to the Stipulation and Settlement Agreement, as amended, and entered a final consent judgment in *White* on August 19, 1993. *See generally White II*, 1993 U.S. Dist. LEXIS 14570.

* * *

The *White* case demonstrates the practical necessity of the mandatory class action mechanism. The *White* case involved a labor dispute which could not have been settled without the availability of a mandatory class. The settlement provided for novel and sweeping injunctive relief, which involved the complete restructuring of the NFL's employment practices, as well as a $115 million settlement payment to be distributed directly to class members. The mandatory class certification in *White* serves to avoid repetitious litigation and the near certainty of varying and inconsistent adjudications that would have followed given the widely conflicting legal standards that presently govern critical issues at the core of the players' liability claims.

The *White* mandatory class received extensive procedural safeguards including adequate representation by competent counsel with fiduciary obligations to the class, fully sufficient notice and opportunity to object, and the searching scrutiny of a district judge whose approval of the settlement is set forth in a readily reviewable 115 page opinion. Nothing more is required by due process.

II. DUE PROCESS DOES NOT REQUIRE THE RIGHT TO OPT OUT WHENEVER DAMAGE CLAIMS ARE ASSERTED IN ADDITION TO INJUNCTIVE CLAIMS

Rule 23 provides a mechanism whereby the judicial system attempts to obtain judicial economy through a single binding adjudication of both plaintiffs' and defendants' rights, while at the same time assuring due process to absent

class members and repose to defendants. Precluding individual lawsuits is considered necessary to protect the defendant from inconsistent obligations, to establish a practical and economical means for disposing of similar lawsuits, and to facilitate the spreading of litigation costs among numerous litigants with similar claims. *See, e.g., General Tel. Co. v. Falcon*, 457 U.S. 147, 155 (1982); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 402-03 (1980); *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979).

The NFL respectfully submits that where the plaintiff class' claims predominantly seek injunctive relief, a district court must have discretion to certify a mandatory non-opt-out class even if that class also seeks money damages. Such discretion is not inconsistent with the due process rights of absent class members so long as they are adequately represented, are provided notice and an opportunity to be heard regarding the adequacy of class representation and their objections to the settlement, and the Court makes a finding as to overall fairness, adequacy, and reasonableness of the settlement. *See, e.g., Williams v. Burlington N., Inc.*, 832 F.2d 100, 103-04 (7th Cir. 1987), *cert. denied*, 485 U.S. 991 (1988); *Walsh v. Great Atl. & Pac. Tea Co.*, 726 F.2d 956, 963 (3d Cir. 1983); *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 507-08 (5th Cir. 1981); *Robertson v. National Basketball Ass'n*, 556 F.2d 682, 686 (2d Cir. 1977).

Due process is a flexible concept and requires only that an individual be treated "fairly" within the confines of

practical realities.[15] As this Court recognized in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14 (1950), a "construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified." Thus, due process allows for a "balancing" between judicial efficiency and the fair treatment of absent class members. *See Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 249 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975).

In *Hansberry v. Lee*, 311 U.S. 32 (1940), this Court held that class actions represent a compromise between "a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process" and the "recognized exception that . . . the judgment in a 'class' or 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it." *Id.* at 40-41.[16] Holding that "adequacy of representation" is the touchstone of due process in class action litigation and that

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15 "Underlying those familiar concepts are familiar notions of necessity or convenience or 'practicability' weighed with or against basic principles of fairness. Such notions are flexible and adaptable to the emerging needs of an increasingly complex community. They may be sensibly and justly applied in ways that will make it entirely fair to render judgments 'binding' upon absent parties in actions that were formerly labeled 'spurious,' and therefore, by definition, non-binding." Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23,* 43 F.R.D. 39, 46 (1967).

16 *See also Martin v. Wilks*, 490 U.S. 755, 761-62 & n.2 (1989) (noting class action litigation under Rule 23 as a "recognized" exception to the general rule that a person is bound only by lawsuits in which he is a party).

absent class members will be bound by all class action judgments in which they are adequately represented, the Court stated:

> so far as it can be said that the members of the class who are present are, by generally recognized rules of law, entitled to stand in judgment for those who are not, we may assume for present purposes that such procedure affords a protection to the parties who are represented, though absent, which would satisfy the requirements of due process and full faith and credit.

Id. at 43.

Several years later, in *Mullane*, this Court confirmed that notice and an opportunity to be heard satisfy due process requirements. In a case that involved the due process rights of absent nonresident trust beneficiaries, the Court stated that:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied. "The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals."

339 U.S. at 314-15 (citations omitted).[17]

The Ninth Circuit's decision below is inconsistent with these principles and is not compelled by *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).[18] In cases properly

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17 Rule 23 was designed by the Advisory Committee, in accordance with this Court's decisions in *Hansberry* and *Mullane*, "to fulfill requirements of due process to which the class action procedure is of course subject." Amendments to Rules of Civil Procedure, Advisory Committee's Note to Rule 23, 39 F.R.D. 69, 107 (1966).

18 In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), upon which the Ninth Circuit incorrectly relied, this Court held that a state court had jurisdiction over nonresident class members in a case "wholly or predominantly for money judgments" because the state class action statute required that absent class members be provided with notice, an opportunity to be heard, and the right to opt out. *Id.* at 811 n.3. This Court specifically "intimate[d] no view" whether opt-out rights were constitutionally required in other types of class actions. *Id. See also In re Jackson Lockdown/MCO Cases*, 107 F.R.D. 703, 714 (E.D. Mich. 1985) ("the Supreme Court [in *Shutts*] did not intend to bar every mandatory class action that did not afford the right of exclusion"); *Bell v. American Title Ins. Co.*, 226 Cal. App. 3d 1589, 1610, 277 Cal. Rptr. 583, 595 (Ct. App.) ("[c]ourts which have addressed the effect of *Shutts* on mandatory classes under rule 23(b)(1) and (b)(2) have interpreted the case as creating no due process right to opt out of such classes"), *review denied*, 1991 Cal. LEXIS 2002 (1991); 1 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 1.19, at 1-48 (3d ed. 1992) ("*Shutts* was silent about the validity of classes certified under Federal Rule 23(b)(1) and (2) or their equivalents which do not provide . . . opt-out rights. It is highly unlikely that the Supreme Court would have invalidated such rules without expressly doing so"); 7B Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 1789, at 256 (2d ed. 1986) ("it seems appropriate to read Shutts restrictively as setting forth its [opt-out] requirements only for Rule 23(b)(3) damage suits, and not as suggesting that similar restraints may be placed on other class actions").

certified under Rules 23(b)(1) and (b)(2),[19] adequacy of representation, notice, and opportunity to be heard are sufficient procedural safeguards to protect the due process rights of absent class members. "Any resultant unfairness to the members of the class [is] outweighed by the purposes behind class actions," see *Wetzel*, 508 F.2d at 249 — namely, eliminating the possibility of repetitious litigation and the risk of inconsistent adjudications, promoting settlement, and providing benefits to the entire class.

In the class action context, members of a mandatory class do have their "day in court." Upon receiving notice, the absent class member has an opportunity to intervene where appropriate, or to appear to state his objections in the class action settlement proceeding. There is nothing inherent in the opt-out right that provides him with any greater opportunity to assert his rights. On the other hand, where injunctive

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19 Class actions involving claims for money damages in addition to injunctive relief are routinely certified pursuant to Rules 23(b)(1) and (b)(2). *See, e.g., Robertson v. National Basketball Ass'n*, 556 F.2d 682, 685 (2d Cir. 1977); *Walsh v. Great Atl. & Pac. Tea Co.*, 726 F.2d 956, 962-66 (3d Cir. 1983); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 801-02 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971); *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 506-08 (5th Cir. 1981); *King v. South Cent. Bell Tel. & Tel. Co.*, 790 F.2d 524, 528-31 (6th Cir. 1986); *Williams v. Burlington N., Inc.*, 832 F.2d 100, 103-04 (7th Cir. 1987), *cert. denied*, 485 U.S. 991 (1988); *Reynolds v. National Football League*, 584 F.2d 280, 283-85 (8th Cir. 1978); *Probe v. State Teachers' Retirement Sys.*, 780 F.2d 776, 780 (9th Cir.), *cert. denied*, 476 U.S. 1170 (1986); *Larionoff v. United States*, 533 F.2d 1167, 1181-82 n.36 (D.C. Cir. 1976), *aff'd*, 431 U.S. 864 (1977).

relief predominates, an opt-out right would lead to repetitious litigation and inconsistent adjudications, and would deter the settlement of large, complex disputes.[20]

III. THE NINTH CIRCUIT'S DECISION SEVERELY UNDERMINES THE PRACTICAL UTILITY OF THE RULE 23 MECHANISM

The Ninth Circuit's sweeping decision will eviscerate the utility of Rule 23(b)(1) and (b)(2) class actions and strike a severe blow to the continuing effectiveness and efficiency of our federal court system.

A. The Mandatory Class Action Mechanism Is Routinely Utilized In A Wide Variety Of Litigation Contexts

The mandatory class action mechanism provided for under Federal Rules 23(b)(1) and (b)(2) is routinely utilized in a wide variety of litigation contexts, and has often proven vital to the ability of the parties to reach an early and

20 In the *White* settlement, the district court employed procedural safeguards that were the functional equivalent of those provided by the opt-out provisions of Rule 23(b)(3). *See Williams*, 832 F.2d at 104; *Kincade*, 638 F.2d at 506-08. First, the court made extensive findings as to why the plaintiff class' claims were predominantly injunctive in nature. *See White I*, 822 F. Supp. at 1411; *White II*, 1993 U.S. Dist. LEXIS 14570, at *39-40. Second, the court found that the class was adequately represented. *See White I*, 822 F. Supp. at 1404-07; *White II*, 1993 U.S. Dist. LEXIS 14570, at *35-37. Third, the court afforded the absent class members with thorough and adequate notice, and an opportunity to be heard regarding their objections to the settlement – including allowing testimony and cross-examination. *See White I*, 822 F. Supp. at 1399-1402; *White II*, 1993 U.S. Dist. LEXIS 14570, at *26-35. Finally, the district court held a hearing at which it heard argument regarding the fairness, reasonableness, and adequacy of the settlement. *See id.*

amicable resolution of class litigation. The areas in which the mandatory class mechanism is most frequently used include: (i) cases involving claims for government benefits;[21] (ii) cases involving employment discrimination and other civil rights claims;[22] and (iii) cases involving labor disputes.[23]

Particularly in the context of labor disputes, it is significant that, within the past two decades, mandatory class-wide settlements have been utilized to resolve a number of cases in which professional athletes have challenged employment restrictions in their respective professional sports leagues. *See Alexander v. National Football League*, 1977-2 Trade Cas. (CCH) ¶ 61,730 (D. Minn. 1977), *aff'd sub nom. Reynolds v. National Football League*, 584 F.2d 280 (8th Cir. 1978); *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867 (S.D.N.Y. 1975), *aff'd*, 556 F.2d 682 (2d Cir. 1977); *Bridgeman v. National Basketball Ass'n*, Civ. No. 87-4001, slip op. (D.N.J. Apr. 18, 1988). In none of these cases was the lack of an opt-out right deemed fatal to the settlement, and indeed, in *Robertson*, the proposed settlement was approved by the Second Circuit

21 *See, e.g., Califano v. Yamasaki*, 442 U.S. 682 (1979) (social security benefits); *Hohe v. Casey*, 128 F.R.D. 68 (M.D. Pa. 1989) (state government's "fair share arrangement" with union).

22 *See, e.g., King v. South Cent. Bell Tel. & Tel. Co.*, 790 F.2d 524 (6th Cir. 1986) (employment discrimination); *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501 (5th Cir. 1981) (employment discrimination).

23 *See, e.g., Walsh v. Great Atl. & Pac. Tea Co.*, 726 F.2d 956 (3d Cir. 1983) (employee defined-benefits plan); *Laskey v. International Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 638 F.2d 954 (6th Cir. 1981) (health insurance benefits); *Mungin v. Florida E. Coast Ry. Co.*, 318 F. Supp. 720 (M.D. Fla. 1970) (Railway Labor Act violations and breach of collective bargaining agreements), *aff'd mem.*, 441 F.2d 728 (5th Cir.), *cert. denied*, 404 U.S. 897 (1971).

despite direct constitutional challenges to the maintenance of a mandatory class. *See Robertson*, 556 F.2d at 686 ("[w]hen appropriate notice and opportunity have been provided, preclusion of the opt-out right in a (b)(1) settlement does not violate due process").

Indeed, in labor disputes, a mandatory class consisting of employees, as in *White*, is consistent with the principle that properly constituted collective bargaining representatives can negotiate back-to-work or reinstatement agreements after a strike or lock-out, and compromise claims for back pay of individual members, who are bound by the union's negotiations. *See, e.g., Mahon v. NLRB*, 808 F.2d 1342, 1345 (9th Cir. 1987). There is no analytical difference between the right of a union to settle employee back pay claims and the ability of class counsel, found by the court to be adequate class representatives, to settle the employment-related claims of mandatory class members, subject to court approval of the fairness of the settlement.

B. Mandatory Non-Opt-Out Class Actions Promote Judicial Efficiency

Policy considerations that have important practical implications, such as "finality of judgment" and the avoidance of repetitious litigation, as well as the avoidance of procedural complications, have routinely been taken into account by courts choosing to certify classes pursuant to Rule 23(b)(1) or (b)(2) instead of Rule 23(b)(3). *See, e.g., Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 244 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975); *Specialty Cabinets & Fixtures, Inc. v. American Equitable Life Ins. Co.*, 140 F.R.D. 474, 477 (S.D. Ga. 1991). Indeed, it has become a general rule of practice that, where a class action is

properly certifiable under either the mandatory provisions of Rules 23(b)(1) and/or (b)(2) or the opt-out provisions of Rule 23(b)(3), the class should be certified exclusively under the mandatory provisions. *See id.*[24]

Any bifurcation of class certification should be a decision left to the discretion of the trial court. *See, e.g., Williams v. Burlington N., Inc.*, 832 F.2d 100, 103 (7th Cir. 1987) (in context of mandatory class action settlement, the district court's refusal to bifurcate the class certification between equitable and monetary phases of relief was not an abuse of

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24 *See also* 3B James W. Moore & John E. Kennedy, *Moore's Federal Practice* ¶ 23.31[3], at 23-236 (1993) ("[i]f an action can be maintained under (b)(1) and/or (b)(2), and also under (b)(3), the court should order that the suit be maintained as a class action under (b)(1) and/or (b)(2) . . . so that the judgment will have res judicata effect as to all the class . . . thereby furthering [the] policy underlying the (b)(1) and (b)(2) class suits"); 1 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 4.20, at 4-71 (3d ed. 1992) ("[i]f federal district courts had discretion to certify the Rule 23(b)(1) or (b)(2) type of situations under the more general provisions of Rule 23(b)(3), the intention of the drafters of Rule 23 to promote uniformity of decision in certain types of cases would be nullified. It follows that class actions that qualify for class certification under subdivision (b)(1) or (b)(2) should not normally be certified under subdivision (b)(3)"); 7A Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 1772, at 425 (2d ed. 1986) ("[s]ince the class members in a Rule 23(b)(3) action are given the option not to be included in the judgment, it has been held that Rule 23(b)(1) should control when both provisions apply").

discretion), *cert. denied*, 485 U.S. 991 (1988).[25] Such a bifurcation procedure should not be constitutionally mandated where, as in *White*, injunctive and monetary relief are inextricably intertwined, and where sufficient alternative procedural safeguards are employed by the court so as adequately to protect the individual rights of absent class members.

C. The Mandatory Class Action Mechanism Often Facilitates The Resolution Of Class Claims By Settlement

Public policy strongly favors the settlement of class action litigation. *See, e.g., Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977); *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976). The utility of the mandatory class action in facilitating settlement has been widely recognized and has often been identified as an important consideration underlying a court's decision to certify a mandatory class. As noted by the Fifth Circuit in *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501 (5th Cir. 1981):

> There is also an important policy consideration dictating that objectors to the settlement of a Rule 23(b)(2) class action need not be provided an opportunity to opt out of the settlement. "Particularly in class action suits, there is an overriding

[25] *See also Bell v. American Title Ins. Co.*, 226 Cal. App. 3d 1589, 1609, 277 Cal. Rptr. 583, 594 (Ct. App.) ("where, as here, the class members are adequately represented by counsel, are given notice and an opportunity to express their objections to the settlement, and the court holds a final hearing to determine the fairness and adequacy of the settlement, the trial court does not abuse its discretion by failing to treat the damages aspect of the case under Rule 23(b)(3)"), *review denied*, 1991 Cal. LEXIS 2002 (1991).

> public interest in favor of the settlement;" allowing objectors to opt out would discourage settlements because class action defendants would not be inclined to settle where the result would likely be a settlement applicable only to class members with questionable claims, with those having stronger claims opting out to pursue their individual claims separately.

Id. at 507 (citations omitted).[26]

Thus, the Ninth Circuit's decision below would serve to discourage or eliminate class action settlements, and clearly runs against the strong public policy favoring such settlements.

[26] *See also King v. South Cent. Bell Tel. & Tel. Co.*, 790 F.2d 524, 528 (6th Cir. 1986); *Kemp v. Birmingham News Co.*, 608 F.2d 1049, 1053 (5th Cir. 1979); *In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 1986-1 Trade Cas. (CCH) ¶ 67,149, at 62,929 (E.D. Pa. 1986), *aff'd*, 815 F.2d 695 (3d Cir. 1987), *cert. denied*, 485 U.S. 909 (1988); *Mungin v. Florida E. Coast Ry. Co.*, 318 F. Supp. 720, 736-37 (M.D. Fla. 1970), *aff'd mem.*, 441 F.2d 728 (5th Cir.), *cert. denied*, 404 U.S. 897 (1971); 1 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 5.40, at 5-37 (3d ed. 1992).

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be reversed.

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